

Montana Water Court
PO Box 1389
Bozeman, MT 59771-1389
(406) 586-4364
1-800-624-3270
watercourt@mt.gov

FILED
02/03/2023
Sara Calkins
CLERK
Montana Water Court
STATE OF MONTANA
By: D'Ann CIGLER
41N-0244-R-2022
White, Eugene
3.00

IN THE WATER COURT OF THE STATE OF MONTANA
UPPER MISSOURI DIVISION
WILLOW CREEK BASIN (41N)
PRELIMINARY DECREE

CLAIMANTS: Big Rose Colony Inc.; Harold T. Scalese
Karen Scalese; Linda Keller

CASE: 41N-0244-R-2022

41N 121611-00

41N 121613-00

41N 121614-00

41N 121615-00

41N 121617-00

NOTICE OF FILING OF MASTER'S REPORT

This Master's Report was filed with the Montana Water Court on the above stamped date. Please review this report carefully.

You may file a written objection to this Master's Report within **10 days** of the stamped date if you disagree or find errors with the Master's findings of fact, conclusions of law, or recommendations. Rule 23, W.R.Adj.R. If the Master's Report was mailed to you, the Montana Rules of Civil Procedure allow an additional 3 days be added to the 10-day objection period. Rule 6(d), M.R.Civ.P. If you file an objection, you must serve a copy of the objection to all parties on the service list found at the end of the Master's Report. The original objection and a certificate of mailing to all parties on the service list must be filed with the Water Court.

If you do not file a timely objection, the Water Court will conclude that you agree with the content of this Master's Report.

MASTER'S REPORT

All water right claims that appeared in the Preliminary Decree for Willow Creek (Basin 41N) were subject to “issue remarks” resulting from pre-decree examination by the DNRC, objections, and counterobjections.

Claims 41N 121611-00, 41N 121613-00, 41N 121614-00, 41N 121615-00 and 41N 121617-00 were consolidated into Case 41N-0244-R-2022 to resolve the issue remarks.

FINDINGS OF FACT

1. Claim 41N 121615-00 received the following substantive issue remark:

THE CLAIMED SOURCE MAY BE QUESTIONABLE. BASED ON AVAILABLE DATA, THE SOURCE MAY BE SURFACE WATER FROM UNNAMED TRIBUTARY OF WILLOW CREEK, WEST FORK.

2. On June 14, 2022, the Court consolidated the above captioned claims into Water Court case 41N-0244-R-2022 and set a filing deadline for the Claimants to respond if they agreed that the source for claim 121615-00 should be modified as described above. Nothing was filed by the ordered deadline.

3. On September 27, 2022, the Court set a second filing deadline for Claimants to determine if any modification should be made to the source element for claim 41N 121615-00. Again, nothing was filed by the ordered deadline.

4. Each of the above-captioned claims received notice-type issue remarks during the DNRC's claim reexamination.

PRINCIPLES OF LAW

1. A properly filed Statement of Claim for an existing water right is prima facie proof of its content. Section 85-2-227, MCA; Rule 10, W.R.Adj.R.

2. Prima facie proof may be contradicted and overcome by a preponderance of the evidence. Rule 19, W.R.Adj.R.

3. A preponderance of the evidence is evidence that shows a fact is “more probable than not.” *Hohenlohe v. State*, 2010 MT 203, ¶ 33, 357 Mont. 438, 240 P.3d 628.

4. If prima facie status is overcome, the burden shifts back to the claimant to demonstrate historical use. *79 Ranch v. Pitsch*, 204 Mont. 426, 432-33, 666 P.2d 215, 218 (1983).

5. Section 85-2-248(2), MCA, requires that the Water Court resolve all issue remarks that are not resolved through the objection process. *See also* Rule 7, W.R.Adj.R.

6. The Water Court may use information submitted by the DNRC, the Statement of Claim, and any other data obtained by the Court to evaluate a water right. Sections 85-2-227, -231(2), MCA.

7. When resolving issue remarks, the Water Court must weigh the information resulting in the issue remark and the issue remark against the claimed water right. Section 85-2-247(2), MCA. The factual evidence on which an issue remark is based must meet the preponderance of evidence standard before the prima facie status of a claim is overcome. 43Q 200996-00 et al., Order Establishing Volume and Order Closing Case, at 18, June 8, 2015.

8. If a claimant fails to comply with an order issued by the Water Court, the Court may issue orders of sanction that are just. Rule 22, W.R.Adj.R.

CONCLUSIONS OF LAW

1. The information in the record is sufficient to resolve the above-listed issue remark appearing on claim 41N 121615-00. Because the Claimants did not respond to the filing deadline, the issue remarks do not overcome the prima facie status of the Statement of Claim. The source element should remain as it appears on the abstract, and the issue remarks should be removed from the claim.

2. The notice-type issue remarks appearing on each of the claims served their notice purpose and should be removed from the claims.

RECOMMENDATIONS

Based on the foregoing Findings of Fact and Conclusions of Law, this Master recommends that the Court adopt the changes as outlined above.

Post decree abstracts of the water right claims reflecting the recommended changes are attached to this Report.

ELECTRONICALLY SIGNED AND DATED BELOW.

Service via USPS Mail:

Big Rose Colony Inc.
P.O. Box 905
Shelby, MT 59474-0905

Harold T. Scalese
Karen Scalese
Linda Keller
P.O. Box 287
Sunburst, MT 59482-0287

POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
WILLOW CREEK
BASIN 41N

Water Right Number: 41N 121611-00 STATEMENT OF CLAIM
Version: 4 -- POST DECREE
Status: ACTIVE

Owners: BIG ROSE COLONY INC
PO BOX 905
SHELBY, MT 59474 0905

Priority Date: DECEMBER 31, 1931

Type of Historical Right: USE

Purpose (use): STOCK

***Flow Rate:** NO FLOW RATE HAS BEEN DECREED FOR THIS USE FROM THIS ONSTREAM RESERVOIR.

Volume: THIS RIGHT INCLUDES THE AMOUNT OF WATER CONSUMPTIVELY USED FOR STOCK WATERING PURPOSES AT THE RATE OF 30 GALLONS PER DAY PER ANIMAL UNIT. ANIMAL UNITS SHALL BE BASED ON REASONABLE CARRYING CAPACITY AND HISTORICAL USE OF THE AREA SERVICED BY THIS WATER SOURCE.

***Source Name:** WEST FORK WILLOW CREEK

Source Type: SURFACE WATER
ALSO KNOWN AS GUNWALD NESBO COULEE

Point of Diversion and Means of Diversion:

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		SWNWNW	25	33N	2W	TOOLE

***Period of Diversion:** JANUARY 1 TO DECEMBER 31

Diversion Means: DAM

Reservoir: ONSTREAM

<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
	SWNWNW	25	33N	2W	TOOLE

Diversion to Reservoir: DIVERSION # 1

Period of Use: JANUARY 1 TO DECEMBER 31

Place of Use:

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1			SWNWNW	25	33N	2W	TOOLE

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
WILLOW CREEK
BASIN 41N**

Water Right Number: 41N 121613-00 STATEMENT OF CLAIM
Version: 4 -- POST DECREE
Status: ACTIVE

Owners: BIG ROSE COLONY INC
PO BOX 905
SHELBY, MT 59474 0905

Priority Date: DECEMBER 31, 1933

Type of Historical Right: USE

Purpose (use): STOCK

***Flow Rate:** NO FLOW RATE HAS BEEN DECREED FOR THIS USE FROM THIS ONSTREAM RESERVOIR.

Volume: THIS RIGHT INCLUDES THE AMOUNT OF WATER CONSUMPTIVELY USED FOR STOCK WATERING PURPOSES AT THE RATE OF 30 GALLONS PER DAY PER ANIMAL UNIT. ANIMAL UNITS SHALL BE BASED ON REASONABLE CARRYING CAPACITY AND HISTORICAL USE OF THE AREA SERVICED BY THIS WATER SOURCE.

***Source Name:** WEST FORK WILLOW CREEK

Source Type: SURFACE WATER
ALSO KNOWN AS GUNWALD NESBO COULEE

Point of Diversion and Means of Diversion:

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		NESWNW	25	33N	2W	TOOLE

***Period of Diversion:** JANUARY 1 TO DECEMBER 31

Diversion Means: DAM

Reservoir: ONSTREAM

<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
	NESWNW	25	33N	2W	TOOLE

Diversion to Reservoir: DIVERSION # 1

***Period of Use:** JANUARY 1 TO DECEMBER 31

Place of Use:

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1			NESWNW	25	33N	2W	TOOLE

POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
WILLOW CREEK
BASIN 41N

Water Right Number: 41N 121614-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners:

BIG ROSE COLONY INC

PO BOX 905

SHELBY, MT 59474 0905

HAROLD T SCALESE

PO BOX 287

SUNBURST, MT 59482 0287

KAREN SCALESE

PO BOX 287

SUNBURST, MT 59482 0287

LINDA KELLER

PO BOX 287

SUNBURST, MT 59482 0287

Priority Date: DECEMBER 31, 1928

Type of Historical Right: USE

Purpose (use): STOCK

Flow Rate: A SPECIFIC FLOW RATE HAS NOT BEEN DECREED BECAUSE THIS USE CONSISTS OF STOCK DRINKING DIRECTLY FROM THE SOURCE, OR FROM A DITCH SYSTEM. THE FLOW RATE IS LIMITED TO THE MINIMUM AMOUNT HISTORICALLY NECESSARY TO SUSTAIN THIS PURPOSE.

Volume: THIS RIGHT INCLUDES THE AMOUNT OF WATER CONSUMPTIVELY USED FOR STOCK WATERING PURPOSES AT THE RATE OF 30 GALLONS PER DAY PER ANIMAL UNIT. ANIMAL UNITS SHALL BE BASED ON REASONABLE CARRYING CAPACITY AND HISTORICAL USE OF THE AREA SERVICED BY THIS WATER SOURCE.

Source Name: WEST FORK WILLOW CREEK

Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		NENE	26	33N	2W	TOOLE
Period of Diversion:	APRIL 1 TO MAY 31					
Diversion Means:	LIVESTOCK DIRECT FROM SOURCE					
2		S2NWNW	25	33N	2W	TOOLE
Period of Diversion:	APRIL 1 TO MAY 31					
Diversion Means:	LIVESTOCK DIRECT FROM SOURCE					
3		NESWNW	25	33N	2W	TOOLE
Period of Diversion:	APRIL 1 TO MAY 31					
Diversion Means:	LIVESTOCK DIRECT FROM SOURCE					

4 NWSENW 25 33N 2W TOOLE

Period of Diversion: APRIL 1 TO MAY 31

Diversion Means: LIVESTOCK DIRECT FROM SOURCE

5 SESENW 25 33N 2W TOOLE

Period of Diversion: APRIL 1 TO MAY 31

Diversion Means: LIVESTOCK DIRECT FROM SOURCE

Period of Use: APRIL 1 TO MAY 31

Place of Use:

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1			S2NWNW	25	33N	2W	TOOLE
2			NENE	26	33N	2W	TOOLE
3			NESWNW	25	33N	2W	TOOLE
4			NWSENW	25	33N	2W	TOOLE
5			SESENW	25	33N	2W	TOOLE

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
WILLOW CREEK
BASIN 41N**

Water Right Number: 41N 121615-00 STATEMENT OF CLAIM
Version: 4 -- POST DECREE
Status: ACTIVE

Owners: BIG ROSE COLONY INC
PO BOX 905
SHELBY, MT 59474 0905

Priority Date: DECEMBER 31, 1955

Type of Historical Right: USE

Purpose (use): STOCK

***Flow Rate:** NO FLOW RATE HAS BEEN DECREED FOR THIS USE FROM THIS ONSTREAM RESERVOIR.

Volume: THIS RIGHT INCLUDES THE AMOUNT OF WATER CONSUMPTIVELY USED FOR STOCK WATERING PURPOSES AT THE RATE OF 30 GALLONS PER DAY PER ANIMAL UNIT. ANIMAL UNITS SHALL BE BASED ON REASONABLE CARRYING CAPACITY AND HISTORICAL USE OF THE AREA SERVICED BY THIS WATER SOURCE.

Source Name: WEST FORK WILLOW CREEK

Source Type: SURFACE WATER
ALSO KNOWN AS GUNWALD NESBO COULEE

Point of Diversion and Means of Diversion:

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		SESENW	25	33N	2W	TOOLE

***Period of Diversion:** JANUARY 1 TO DECEMBER 31

Diversion Means: DAM

Reservoir: ONSTREAM

<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
	SESENW	25	33N	2W	TOOLE

Diversion to Reservoir: DIVERSION # 1

***Period of Use:** JANUARY 1 TO DECEMBER 31

Place of Use:

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1			SESENW	25	33N	2W	TOOLE

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
WILLOW CREEK
BASIN 41N**

Water Right Number: 41N 121617-00 STATEMENT OF CLAIM
Version: 4 -- POST DECREE
Status: ACTIVE

Owners: BIG ROSE COLONY INC
PO BOX 905
SHELBY, MT 59474 0905

Priority Date: DECEMBER 31, 1967

Type of Historical Right: USE

Purpose (use): STOCK

***Flow Rate:** NO FLOW RATE HAS BEEN DECREED FOR THIS USE FROM THIS ONSTREAM RESERVOIR.

Volume: THIS RIGHT INCLUDES THE AMOUNT OF WATER CONSUMPTIVELY USED FOR STOCK WATERING PURPOSES AT THE RATE OF 30 GALLONS PER DAY PER ANIMAL UNIT. ANIMAL UNITS SHALL BE BASED ON REASONABLE CARRYING CAPACITY AND HISTORICAL USE OF THE AREA SERVICED BY THIS WATER SOURCE.

***Source Name:** UNNAMED TRIBUTARY OF WEST FORK WILLOW CREEK

Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		SESESW	25	33N	2W	TOOLE

***Period of Diversion:** JANUARY 1 TO DECEMBER 31

Diversion Means: PIT

Reservoir: ONSTREAM

<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
	SESESW	25	33N	2W	TOOLE

Diversion to Reservoir: DIVERSION # 1

Period of Use: MAY 1 TO SEPTEMBER 30

Place of Use:

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1			SESESW	25	33N	2W	TOOLE